

**FILED**

**MAR 13 2006**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

JOSE ALFARO and ESMERALDA  
HERRERA,

Petitioners,

v.

ALBERTO R. GONZALES, Attorney  
General,

Respondent.

No. 04-70777

Agency Nos. A75-707-806  
A74-433-124

MEMORANDUM<sup>\*</sup>

On Petition for Review of an Order of the  
Board of Immigration Appeals

Submitted March 9, 2006<sup>\*\*</sup>  
Pasadena, California

Before: WARDLAW and RAWLINSON, Circuit Judges, and CEBULL<sup>\*\*\*</sup>,  
District Judge.

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<sup>\*</sup> This disposition is not appropriate for publication and may not be  
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without  
oral argument. *See* Fed. R. App. P. 34(a)(2).

<sup>\*\*\*</sup> The Honorable Richard F. Cebull, United States District Judge for  
the District of Montana, sitting by designation.

Jose Alfaro, a citizen of El Salvador, and his wife, Esmeralda Herrera, a citizen of Mexico, petition for review of a decision by the Board of Immigration Appeals (BIA) affirming without opinion the decision by the Immigration Judge denying their application for cancellation of removal based upon failure to establish exceptional and extremely unusual hardship.

1. We lack jurisdiction to review the discretionary determination of hardship, but we have jurisdiction to review Petitioners' constitutional due process claims. *See Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005). However, the asserted due process claim that the IJ failed to apply the correct legal standard to their application for cancellation of removal is without merit, as the IJ explicitly found that petitioners failed to establish that removal would result in exceptional and extremely unusual hardship to any of their United States citizen children. *See id.* "[T]raditional abuse of discretion challenges recast as alleged due process violations do not constitute colorable constitutional claims that would invoke our jurisdiction." *Id.*

2. The BIA's refusal to accept Petitioners' untimely brief was not a violation of their due process rights because they had adequate notice of the filing

requirements and due date for the brief, were apprised of the procedure for requesting an extension, and did not provide a reasonable explanation for failure to do so within the time prescribed. *See Singh v. Gonzales*, 416 F.3d 1006, 1014-15 (9th Cir. 2005) (finding no due process violation when the appeal was dismissed by the BIA because the alien failed to file a brief or request an extension after receiving notice of the filing requirements).

3. Petitioners' challenge to the BIA's summary affirmance procedure is foreclosed by *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 852 (9th Cir. 2003).

4. The voluntary departure period the INS granted petitioners will expire upon issuance of the mandate. *See Desta v. Ashcroft*, 365 F.3d 741, 750 (9th Cir. 2004).

**PETITION DISMISSED in part, DENIED in part.**